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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

77-1511

JOSEPH A. CALIFANO, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, ET AL., PETITIONERS

v.

EVELYN ELLIOTT AND BENITO MOLINA, ET AL.

JOSEPH A. CALIFANO, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, ET AL., PETITIONERS

V.

FANNIE BUFFINGTON AND FRANCES BINER, ET AL.

RESPONDENTS' SUPPLEMENTAL RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT; APPENDIX A

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INTRODUCTION

Respondents file this supplemental brief in response to the Secretary's certiorari petition in order to bring to the attention of the Court the case of Mattern v. Mathews, _____ F.2d _____, 47 L.W. 2045. (3rd Cir. June 30, 1978) (Slip Opinion attached), which was decided approximately one week after Respondents' initial response was filed.[1/] The issues in Mattern and Elliott are identical in every material aspect, and, as will be discussed more thoroughly below, the Third Circuit's recent opinion is in accord with the decision rendered by the Ninth Circuit in Elliott.

Respondents submit that it is now clear that the Secretary cannot establish any grounds for the exercise of this Court's discretionary jurisdiction. Consequently, the petition for certiorari should be denied because there is no conflict in the courts of appeals on the issues which the Secretary seeks review, and these two appellate decisions consistently and correctly applied the "balancing of interests" test mandated by this Court in Mathews v. Eldridge, 424 U.S. 319 (1976).

1/ In Mathews v. Mattern, 425 U.S. 987 (1976), this Court vacated and remanded the Third Circuit's original Mattern decision, Weinberger v. Mattern, 519 F.2d 150 (3rd Cir. 1975) for reconsideration in light of Mathews v. Eldridge, 424 U.S. 319 (1976).. On remand the district court reversed its earlier decision, Mattern v. Mathews, 377 F. Supp. 906 (E.D. Pa. 1974), and ruled that the Secretary's challenged overpayment procedures did satisfy due process requirements. That decision was appealed, and on June 30, 1978, the Third Circuit reversed the district court, substantially reaffirming its original decision.

The Third Circuit had originally ruled that prior oral hearings in "reconsideration" cases were required only in those instances in which the credibility of the recipient was at issue, without attempting to define or describe when that exception should be applied. However, in the recent opinion the court concluded that the "credibility" exception was not mandated in reconsideration cases, while reaffirming that prior hearings were required in all waiver cases. (Slip Opinion at 2).

ARGUMENT

BECAUSE THE MATTERN DECISION IS ENTIRELY IN HARMONY WITH THE ELLIOTT DECISION, THE SECRETARY CAN SHOW NO GROUNDS FOR THIS COURT TO GRANT CERTIORARI.

Under the rules of this Court, in order to be entitled to review by certiorari, the Secretary must show either a conflict in the courts of appeal on the issues on which he seeks certiorari or a significant inconsistency between the Elliott decision and prior decisions of this Court, i.e. Eldridge v. Mathews. In their initial response to the petition for certiorari, Respondents showed that the Secretary failed to establish any of the minimum grounds for certiorari in this case. As will be discussed further below, the recent Mattern decision by the Third Circuit Court of Appeals further supports that conclusion.

Briefly discussed below are the issues addressed in Mattern on which the Secretary seeks certiorari in Elliott. From this discussion, it is unquestionable that the decision of the Ninth Circuit Court of Appeals in Elliott and the decision of the Third Circuit Court of Appeals in Mattern are wholly consistent and virtually indistinguishable.

A. Jurisdiction.

The Third Circuit ruled that jurisdiction over Mrs. Mattern's due process claims existed under section 205(g), finding that the claimant had presented a claim for benefits and that the requirement of a final decision after a hearing had been waived. Critical to the court's waiver determination was the finding that "Mrs. Mattern's assertion of the right to a prior hearing is collateral to her claim for benefits," and the conclusion that her "interest in having the constitutional issue resolved

promptly is so great that further deference to agency procedures is inappropriate," (Slip Opinion at 10), citing Mathews v. Eldridge, supra, at 330. This conclusion is exactly the one reached by the Ninth Circuit Court of Appeals in Elliott.

B. Class.

The district court certified a district-wide class in the first Mattern decision, but on remand, the district court refused to certify a class, apparently basing its decision on its interpretation of Weinberger v. Salfi, 422 U.S. 749 (1975). However, the Court of Appeals ordered the district court to reconsider the class question in light of that court's decision in Liberty Alliance of the Blind v. Califano, 568 F.2d 333 (3rd Cir. 1977), in which the court ruled that a class action could be maintained under section 205(g). Again, in adhering to the Liberty Alliance ruling, the Mattern court decided this issue in harmony with the decision in Elliott.

C. Merits.

The fundamental question in both Mattern and Elliott is whether Social Security recipients who have requested the statutorily mandated waiver provisions of 42 U.S.C. § 404(b) are entitled to oral evidentiary hearings before the Secretary begins recoupment action for past overpayments. Both courts have answered that question in the affirmative, and the two decisions are consistent in that regard. Adhering fully to its original decision, the Third Circuit ruled that "the due process clause requires a pre-recoupment claim of entitlement to 'waiver' or recoupment under § 204(b)." (Slip Opinion at 22).

In Mattern and Elliott the courts consistently applied the three-part balancing test set forth by this Court in

Eldridge, and reached the same results. First, in examining the private interest involved, the Mattern court rejected the district court's conclusion that the private interest in Mattern was less than the private interest at stake in Eldridge, declaring that "the private interest, particularly in the 'waiver' cases, falls between that considered in Eldridge and that in Goldberg." (Slip Opinion at 13-14; citing Elliott at 1231.) In reaching that conclusion, the court, like the court in Elliott, found that, unlike Eldridge, "the benefits in this case are in part need-based," (citing Elliott at 1231), and that "when a waiver is erroneously denied by the Secretary prior to a hearing, the recipient faces a particularly severe impact." (Slip Opinion at 13).

The second element of the Eldridge test is the "fairness and reliability of the existing...procedures, and the probable value, if any, of additional procedural safeguards," Eldridge supra, at 343. The Mattern court reaffirmed its previous conclusion that "reconsideration cases are generally well-suited to resolution by documentary proof," (Slip Opinion at 15), but that waiver cases, which often involve "a complex analysis of facts and of credibility" relating to fault, financial dependence, and detrimental relieance, require pre-recoupment oral hearings. (Slip Opinion at 15; Elliott at 1232-1234). The presence of these issues in waiver cases caused the Mattern court to distinguish between waiver cases and the disability termination cases at issue in Eldridge regarding the importance of prior oral evidentiary hearings. The court declared that "the most substantial difference between the recoupment procedure and the termination of disability is the value of a prior hearing to the fact-finding which the Secretary must perform." (Slip Opinion at 21). This conclusion is wholly consistent

with Elliott.[2/]

In addressing the third element of the balancing test, the government's interest, the Mattern court noted two critical distinctions between this case and Eldridge, which supported its conclusion, and the one in Elliott, that requiring pre-recoupment hearings would not unduly "impinge" upon the administration of the Social Security program. (Slip Opinion at 18). First, noting that "only 1,212 persons (out of 23,345 whose waiver requests have been denied) availed themselves of the right to a (prior hearing) before their benefits were reduced," and that "the Secretary has not argued that this number is expected to rise," (citing Elliott at 1235) (Slip Opinion at 19, n. 12), the court concluded that an assumption similar to the one made in Eldridge about the threatened increased burden on the Administration would not be proper. Indeed, the figures introduced by the Secretary in his certiorari petition in Elliott (1250 hearings at a cost of approximately $100,000) confirm that conclusion. (Petition at 21). Second, the Third Circuit agreed with the Ninth Circuit in concluding that, unlike Eldridge, in an overpayment recoupment case there is far less likelihood of irretrievable loss of erroneously paid benefits. In Eldridge the Secretary was faced with having to pay continuing benefits to ineligible recipients who would eventually be terminated, thus making collection of any overpayments much more difficult.

2/ Specifically, the Elliott court concluded at 1234 that: "...most of the factors involved in a waiver determination are not capable of resolution by written submissions. Therefore, the Secretary's current procedure for handling waivers creates an undue likelihood of erroneous deprivation, which could be obviated by pre-recoupment oral hearings."

The Mattern court correctly noted that, by contrast, in Mattern and Elliott the Secretary was being asked to merely delay recoupment from recipients who, in the vast majority of cases, would continue to recieve benefits from which overpayments could be recouped at a later date. See Elliott at 1235.

Consequently, after applying the three-part Eldridge analysis, the Mattern court, like the Elliott court, concluded the Secretary's challenged recoupment procedures are illegal and violate applicable due process requirements of providing social security recipients with a meaningful opportunity to be heard.

CONCLUSION

Respondents submit that Mattern and Elliott are consistent with each other and consistent with this Court's decision in Eldridge. It is now readily apparent that the Secretary cannot show a "conflict with another court of appeals on the same matter" as required by Rule 19(b), and that decision of the Ninth Circuit is in complete harmony with the applicable decisions of this Court. Consequently, the petition for certiorari should be denied.

DATED: August 15, 1978

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 77-1629

ARLENE M. MATTERN,

Appellant,

v.

F. DAVID MATHEWS, Secretary of Health, Education and Welfare,

Appellee.

Appeal from the United States District Court
For the Eastern District of Pennsylvania
D.C. Civil No. 72-2522

Argued February 17, 1978

Before GIBBONS, HUNTER, Circuit Judges
and STAPLETON, District Judge*

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* Honorable Walter K. Stapleton, United States District Judge for the District of Delaware, sitting by designation

APPENDIX A
582 F.2d 248 (Not reproduced here).